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EX PARTE

October 8, 2004

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W., Room TW-A325
Washington, DC 20554

Re: *In the Matter of IP-Enabled Services, WC Docket No. 04-36*

Dear Ms. Dortch:

Enclosed with this cover letter is a Memorandum that discusses several aspects of the Federal Communications Commission's ("FCC") authority to preempt state regulation of IP-enabled services, including the IP voice application. This Memorandum supplements filings previously made on the record by Qwest in the above-captioned proceeding, and it is meant to provide answers to several questions raised during an *ex parte* meeting that occurred with FCC staff on September 21, 2004.

In accordance with FCC Rule 47 C.F.R. § 1.49(f), this *ex parte* letter is being filed electronically for inclusion in the public record of the above-referenced proceeding pursuant to FCC Rule 47 C.F.R. § 1.1206(b)(1).

Sincerely,
/s/ Cronan O'Connell

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Robert B. McKenna
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MEMORANDUM

DATE: October 8, 2004

RE: *In the Matter of IP-Enabled Services*, WC Docket No. 04-36 — The FCC Has Ample Statutory Authority to Preempt All State Regulatory Authority Over IP-Enabled Services, Including the IP Voice Application.

The purpose of this memorandum is to discuss several aspects of the Federal Communications Commission's ("FCC") authority to preempt state regulation of IP-enabled services, including the IP voice application. The memorandum supplements the Comments (pp. 25-36) and Reply Comments (pp. 18-35) filed by Qwest Communications International Inc. ("Qwest") in the above-captioned docket. It seeks to answer several questions raised at a Qwest *ex parte* meeting on September 21, 2004.

Basically, Qwest has noted the necessity of FCC preemption of all aspects of state regulation of IP-enabled services (with the exception of state laws and regulations of general applicability to all businesses, including interstate business operations).[1] The importance of such preemption is set forth in Qwest's Comments and Reply Comments, and is otherwise well documented on the record. Basically, the provision of IP-enabled services constitutes the provision of an interstate information service under the Telecommunications Act, and state regulation of any aspect of the provision of IP-enabled services would endanger the full implementation of federal policy over interstate services. In addition, because IP-enabled services have been especially entrusted to the FCC's authority under the Telecommunications Act itself, independent statutory preemption authority exists based on special Internet-specific provisions of the Act—authority which the FCC must exercise whenever any state regulation appears likely to interfere with the basic federal policy concerning the Internet.

While these two bases for federal preemption are obviously closely related, they are independent from a statutory perspective. This memorandum explains the difference between the two approaches to preemption available to the FCC in this docket.

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[1] As noted in our comments, the FCC's preemption must be based on a presumption of deregulation, not regulation. Congress clearly intends that the Internet not be regulated at either the federal or state level.

I. IP-Enabled Services Are Interstate Services Not Subject to State Jurisdiction.

The first analytical approach is based on traditional preemption analysis. The FCC's preemptive authority is such that it is entitled to treat all IP-enabled services as either interstate in nature or so inextricably intertwined with interstate services that federal policy must govern all aspects of Internet regulation. Section 152(b) of the Act,[2] which prohibits the FCC from regulating the "charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio," does not apply in the case of regulation of IP-enabled services because the FCC's clear statutory authority over interstate services (be they telecommunications services or information services) cannot be exercised reasonably if state regulatory authority continues over any aspect of IP-enabled services. IP-enabled services, including the IP voice application, simply cannot be separated into interstate and intrastate components. In fact, given the portability of IP-enabled services, even a voice call that looks like an intrastate service based on traditional measurement assumptions can well be an interstate or an international communication.[3]

The law is very clear on this point: if the FCC's ability to carry out its statutory mandate over interstate communications services is impaired by state regulation of an intrastate service, the FCC is empowered to preempt the state regulation in question. The basic principle was established in *Louisiana Public Service Commission v. Federal Communications Commission*,[4] wherein the Supreme Court summarized the law as follows:

> Where [the] FCC acted within its authority to permit subscribers to provide their own telephones, pre-emption of inconsistent state regulation prohibiting subscribers from connecting their own phones unless used exclusively in interstate service upheld since state regulation would negate the federal tariff.

There are generally two components to this basic preemption analysis: 1) a valid federal policy within the jurisdiction of the FCC;[5] and 2) state regulation that interferes with implementation of that policy.[6] Because the FCC does not have jurisdiction over intrastate services, even the most valid or well constructed federal policy cannot be extended to intrastate services unless state regulation interferes with the implementation of the federal policy within the scope of the FCC's

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[2] 47 U.S.C. § 152(b).

[3] *See* Qwest Reply Comments, pp. 20-23.

[4] 476 U.S. 355, 375-76 n.4 (1986).

[5] *See National Association of Regulatory Utility Commissioners v. FCC*, 880 F.2d 422, 429, 431 (D.C. Cir. 1989).

[6] *See Public Utility Commission of Texas v. FCC,* 886 F.2d 1325, 1332-33 (D.C. Cir. 1989).

statutory jurisdiction (*i.e.*, interstate services).[7] Hence, even though the FCC's decisions concerning depreciation reform were well conceived and publicly beneficial, they could not be imposed on the states in the absence of a nexus to the FCC's jurisdiction over interstate service—as was the case in *Louisiana Public Service Commission*, where the FCC's well-intentioned depreciation rules could not be preemptive in nature because the FCC had no jurisdiction to force the states to adopt the same depreciation rules.[8]

One well recognized exception to the limitation on the FCC's jurisdiction over intrastate services is that, even if a service includes intrastate components (or intrastate communications), federal preemption is nevertheless appropriate if it is both: 1) impossible to separate the federal and state components of the service (*e.g.*, if the same facilities must be used for both intrastate and interstate communications); and 2) impossible for the FCC to carry out the federal regulation of the interstate services without preemption of state regulation.[9] In such a case the FCC may lawfully enter the realm of regulation of intrastate services and preempt state regulation to the extent necessary to carry out the valid federal policy.[10] In the case of IP-enabled services, both of these requirements for preemption are clearly met. There is no rational way to separate interstate and intrastate Internet services, and there is no way that state efforts to regulate any intrastate Internet components can be consistent with the overarching responsibility of the FCC to formulate federal policy on critical interstate and international Internet regulatory issues.

In short, the FCC may preempt state regulation of IP-enabled services because state regulation would impede the FCC's ability to regulate the interstate aspects of those services. To the extent that there are intrastate Internet services or IP-enabled services, it is impossible to separate them, either from a technological or a regulatory perspective. Complete preemption is therefore both lawful and appropriate.

II. Federal Preemption of State Regulation of IP-Enabled Services Is Mandated By Independent Provisions of the Act.

As is noted above, the federal interest is normally limited, for jurisdictional purposes, to interstate services, and state regulation cannot be preempted unless the federal authority over interstate services is jeopardized. This standard analysis is neither necessary nor appropriate in

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7 *See National Association of Regulatory Utility Commissioners v. FCC, supra*, 880 F.2d at 429 (FCC preemption of state regulation of intrastate wire valid only to the extent that state regulation interfered with valid FCC federal rules). *See also Texas Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393, 422 (5th Cir. 1999).

8 *See Louisiana Public Service Commission v. FCC, supra*, 476 U.S. at 374-75. *See also Public Service Commission of Maryland v. FCC*, 909 F.2d 1510, 1516 (D.C. Cir. 1990).

9 *See Louisiana Public Service Commission v. FCC, supra*, 476 U.S. at 376 n.4. *See also Public Service Commission of Maryland v. FCC, supra*, 909 F.2d at 1515; *Public Utility Commission of Texas v. FCC, supra*, 886 F.2d at 1334; *Illinois Bell Telephone Company v. FCC*, 883 F.2d 104, 114-15 (D.C. Cir. 1989).

10 *National Association of Regulatory Utility Commissioners v. FCC, supra*, 880 F.2d at 430.

the case of IP-enabled services, because the FCC has been vested with an express federal jurisdictional mandate over the Internet that supercedes the normal jurisdictional limitations of Section 152(b) of the Act. The federal interest in regulation of the Internet is coterminous with federal jurisdiction over interstate services, and Internet regulatory policy is by definition within the FCC's jurisdiction, whether or not the FCC undertakes a separate analysis confirming that IP-enabled services may be regulated solely by the FCC because of their relation to interstate services.

Specifically, Section 230(b)(2)[11] of Act provides:

> (b) Policy.—It is the policy of the United States—
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> * * * * *
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> (2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation[.]

This statutory provision expands the FCC's statutory authority to adopt and implement federal policy regarding interstate telecommunications to include matters respecting the Internet—with the addition of an express directive to focus on a policy that is deregulatory in nature. The presumption that state regulation of intrastate services will be preserved except when such regulation interferes with the FCC's regulation of interstate services is not valid in the case of IP-enabled services, because the Act treats all Internet services in the same manner as it treats interstate services. A valid FCC policy regarding the Internet is presumptively binding on the states, because regulation (or deregulation)[12] of the Internet is now entrusted to the FCC.

This statutory provision in turn leads to two separate conclusions: 1) State regulation of the Internet, including IP-enabled services, is prohibited by statute in the same manner as is state regulation of interstate services, and the FCC is <u>required</u> to take all necessary preemptive action to prevent state regulators from interfering with or impeding the Congressional purpose that the Internet be free from both federal and state regulation; and 2) State regulation in other spheres traditionally entrusted to state regulators may be validly preempted if it interferes with the FCC's valid policies in the realm of the Internet—a preemptive power which is analyzed under the same rubric as the FCC's authority to preempt state regulations that interfere with the FCC's regulation of interstate services. In other words, from a jurisdictional perspective, the FCC is directed to treat the Internet in the same fashion as it treats interstate services—the regulation and deregulation of the Internet is a matter entrusted to the FCC, and states have no jurisdiction in that federal sphere.

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[11] 47 U.S.C. § 230(b)(2).

[12] FCC preemptive policies do not need to be regulatory in nature. They can be deregulatory as well. *See Computer and Communications Industry Association v. FCC*, 693 F.2d 198, 217 (D.C. Cir. 1982), *cert denied sub nom*. *Louisiana Public Service Commission v. FCC*, 461 U.S. 938 (1983).

III. Conclusion.

The FCC's authority to preempt state regulation of IP-enabled services is predicated on two different statutory empowerments: 1) The FCC has the authority to preempt state regulation that interferes with the FCC's validly promulgated policies with regard to interstate services. Because IP-enabled services are interstate in nature, and any intrastate components of IP-enabled services are inextricably intertwined with the interstate services, the FCC has the power to preempt state regulation of any intrastate IP-enabled services. 2) The FCC has the independent statutory duty and authority to preempt state regulation that interferes with the FCC's validly promulgated policies with regard to the Internet, including all IP-enabled services. This authority is plenary, and operates to preempt all state regulation of all IP-enabled services, even if there should be an IP-enabled service that was totally intrastate in nature (and severable from other IP-enabled services), and it is self-executing in that states have no authority to regulate the Internet even in the absence of FCC action. As is the case with the FCC's regulation of interstate services, state regulatory requirements in other (*i.e.*, non-Internet areas) that interfere with the FCC's Internet policies and are not severable from the FCC's regulation of the Internet are subject to FCC preemptive action.